STATE OF MICHIGAN

COURT OF APPEALS

KAYLA PESSIL LITTMAN, f/k/a KAYLA PESSIL COHEN,

Plaintiff/Counter-Defendant-Appellant,

v

MELVIN CHARLES COHEN,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
August 4, 2009

No. 288209
Oakland Circuit Court
LC No. 2003-684252-DM

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

The parties divorced in 2004, and were awarded joint legal and physical custody of their three children. In 2006, defendant filed an emergency motion to have the children temporarily placed in his sole custody based on allegations of physical and emotional abuse. The trial court granted the motion and temporarily placed the children in defendant's custody, and plaintiff was allowed supervised visits. The matter was referred to the Friend of the Court, which recommended that defendant retain custody of the children. Both parties objected to the Friend of the Court recommendation, so a de novo custody hearing was conducted by the trial court. Following a hearing in September 2008, the court entered an order permanently changing the physical custody of the children to defendant, but allowing plaintiff to retain joint legal custody. Plaintiff appeals as of right. We affirm.

I. Change of Circumstances

Plaintiff first argues that the trial court erred in modifying the joint custody arrangement because defendant did not initially establish either proper cause or a change of circumstances to support a change of custody. We disagree.

In *Brausch v Brausch*, 283 Mich App 339; ___ NW2d ___ (2009), this Court addressed the requirements that must be met before a court may hear a request to change custody:

> The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). A trial court may

> modify a custody award only if the moving party first establishes proper cause or a change in circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). Accordingly, a party seeking a change in the custody of a child is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change in circumstances. *Killingbeck v Killingbeck*, 269 Mich App 132, 146; 711 NW2d 759 (2005). If a party fails to do so, the trial court may not hold a child custody hearing.
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> Although the threshold consideration of whether there was proper cause or a change of circumstances might be fact-intensive and while the court need not conduct an evidentiary hearing on the topic, *id.* at 512, it *must first* address this threshold question. Again, in making this determination, a trial court must determine if the moving party has shown "that, since the entry of the last custody order, the conditions surrounding custody of the child, . . . [has] or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513. [*Brausch, supra,* slip op at 8-9 (footnote omitted).]

Contrary to what plaintiff asserts, the change of custody request was not based simply on the parties' poor communication, which plaintiff maintains was nothing new. The change of circumstances also involved defendant's remarriage, to someone who was formerly plaintiff's close friend and in whom plaintiff had confided, and plaintiff's reaction to that situation, including her increased anger and hostility toward defendant and his new wife, and plaintiff's resulting emotional instability. These were not normal life changes, but rather involved material changes that had a significant effect on the children's well being. The children were placed in the middle of the parties' increasingly contentious relationship and plaintiff 's anger and hostility was directed at alienating the children from defendant and his new wife, causing emotional trauma to the children. Consequently, there was a sufficient showing of a change of circumstances to permit the trial court to revisit the issue of custody.

We disagree with plaintiff that the trial court was required to conduct an evidentiary hearing to determine whether the threshold showing of a change of circumstances existed. As explained in *Vodvarka, supra* at 512, a court is not obligated to conduct an evidentiary hearing when considering the threshold question of whether there is proper cause or a change of circumstances to support a change of custody request. The court can decide if the allegations are sufficient by accepting the facts as alleged as true, and a hearing also is not required if the facts alleged are undisputed. *Id.*

MCR 3.210(C)(8) provides:

> In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.

Before deciding whether to conduct a new custody hearing, the trial court ordered the Friend of the Court to interview the parties to determine if there was merit to defendant's allegations. The

referee submitted his report, which was the equivalent of an offer of proof regarding the allegations in defendant's motion. Because the trial court was equipped with a referee's report which showed that there was facial merit to defendant's allegations, it did not abuse its discretion by failing to conduct an independent evidentiary hearing on the threshold question of change of circumstances.

II. Custody Decision

Next, plaintiff argues that the trial court erred in finding that an established custodial environment existed only with defendant, and also erred in its evaluation of several of the statutory best interest factors. We disagree.

As explained in *Berger v Berger*, 277 Mich App 700, 705-706; 747 NW2d 336 (2008), several different standards of review are applicable to a trial court's decision in a child custody appeal:

> This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). Thus, a trial court's findings regarding the existence of an established custodial environment and with respect to each factor regarding the best interest of a child under MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher, supra* at 879; *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors. *Sinicropi v Mazurek*, 273 Mich App 149, 155, 184; 729 NW2d 256 (2006). The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion. *Fletcher, supra* at 879. An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id.* at 879-880, citing *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). This standard continues to apply to a trial court's custody decision, which is entitled to the utmost level of deference. *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533 (2006). This Court reviews questions of law for clear legal error that occurs when a trial court incorrectly chooses, interprets, or applies the law. *Fletcher, supra* at 881; *Phillips, supra* at 20.

A. Established Custodial Environment

MCL 722.27(1)(c) permits a court to modify an order regarding custody of a child for either proper cause or a change of circumstances, but provides that

> [t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the

> child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

Thus, in resolving a custody dispute, a trial court must first determine if an established custodial environment exists in order to discern the appropriate burden of proof. *LaFleche v Ybarra*, 242 Mich App 692, 695-696; 619 NW2d 738 (2000). Whether an established custodial environment exists is a question of fact. *Berger*, *supra* at 706.

As the trial court observed, a custodial environment can be established by various methods. As explained in *Berger, supra* at 706-707:

> An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian. *Id.* at 579; *Moser v Moser*, 184 Mich App 111, 114-116; 457 NW2d 70 (1990). A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

Plaintiff's contact with the children since September 2006 had been limited to two hour-long visits each week at a supervised facility. While plaintiff was still providing her children with love and guidance during those visits, she was not consistently meeting their needs, or providing the necessities of life and parental comfort on a daily basis. Conversely, defendant had joint custody of the children after the divorce, and the children were in his exclusive physical custody for almost two years. Because the trial court's finding that the children had an established custodial environment only with defendant is not against the great weight of the evidence, we must affirm that decision. *Berger, supra* at 706.

B. Best Interests

A change of custody must be based on a child's best interests. MCL 722.27(1)(c). The "best interests of the child" are determined by considering, evaluating, and determining "the sum total" of the 12 best interest factors set forth in MCL 722.23.

Plaintiff argues that factor (a) should have been weighed in her favor because there was little or no evidence regarding defendant's bond to the children. The evidence focused on the

love, affection, and emotional ties between plaintiff and the children, given the limitations on plaintiff's contact with the children during the previous two years. The love, affection, and emotional ties between defendant and the children was not principally in dispute, and there was no evidence that defendant's bond with the children was lacking. Despite plaintiff's limited contact, the trial court found that the parties were equal with respect to this factor. This finding is not against the great weight of the evidence.

Plaintiff argues that factor (b) should have been weighed in her favor because she continued to insist that the children be raised in accordance with the strict teachings of the Orthodox Jewish faith, whereas defendant had allowed the children to enroll in a more modern orthodox school and attend a less conservative orthodox camp. The trial court noted that both parents supported the children's educations in the Jewish religion. Defendant continued to send the children to a Jewish school and they attended summer camp at the Jewish Community Center. Although plaintiff would prefer adherence to stricter Orthodox Judaism, it is clear that defendant continued to support the children's religion and education in the Jewish faith. The trial court's finding that the parties were equal with respect to this factor is not against the great weight of the evidence.

The trial court found that factor (c) favored defendant. The evidence showed that defendant served as the primary provider of the children's material needs for almost two years. Plaintiff argues that the trial court erred in evaluating this factor because she was formerly primarily responsible for scheduling the children's medical appointments. However, there was no evidence that the children's medical needs were not being met while in defendant's custody. Plaintiff has not shown that the trial court improperly weighed this factor.

Plaintiff argues that the trial court erred in weighing factor (d) in favor of defendant because she owned her home longer and the children were more familiar with the community in which she lived. However, the focus of this factor is on the stability of the children's living environment. The evidence showed that the children were doing well as a family with defendant and his new wife. Conversely, their contact with plaintiff was very limited during the previous two years. The trial court did not err in weighing this factor in favor of defendant.

Plaintiff does not challenge the trial court's determination that the parties were equal with respect to factor (e).

Plaintiff contends that the trial court clearly erred in finding that the parties were equal with respect to factor (f), because defendant admitted that he previously recorded the children's telephone conversations with plaintiff and involved the children in the parties' disputes. While we do not condone defendant's actions, plaintiff also is not blameless in this area. Plaintiff's conduct in attempting to alienate the children from defendant and his new wife contributed to the circumstances that led to defendant filing for a change of custody, and Dr. Danuloff's findings demonstrated that plaintiff 's conduct had a negative impact on the children. The evidence does not establish that plaintiff was the more morally fit parent. The trial court's finding that the parties were equal on this factor is not against the great weight of the evidence.

The trial court found that factor (g), the parties' mental and physical health, favored defendant. In arguing that this factor was erroneously scored, plaintiff focuses on defendant's alleged conduct before the parties divorced. But because this was a petition for a change of

custody post-divorce, the trial court properly focused on the circumstances since the entry of the previous custody determination. The evidence of plaintiff's mental and emotional instability, and her need for therapy to learn to control her anger and hostility against defendant and his new wife, supports the trial court's decision to weigh this factor in favor of defendant.

The trial court found that factor (h) favored defendant. Plaintiff argues that this was clear error in light of the evidence that the children had difficulties in school and one child had to repeat a grade. She asserts that they performed better academically when in her custody. However, plaintiff has not shown that defendant caused the difficulties the children previously experienced in school. There was evidence that plaintiff's instability and hostility had a significant effect on the children. To the extent that their academic and social lives suffered, plaintiff's conduct and inability to accept defendant's new marriage was likely a contributing factor. Conversely, the evidence showed that since defendant obtained primary custody of the children, he enrolled them in a new school and they were adjusting and doing better academically. The trial court's decision to weigh this factor in favor of defendant is not against the great weight of the evidence.

The trial court considered factor (i), the children's reasonable preferences, but did not reveal those preferences or indicate if either party prevailed on this factor. The trial court was not required to reveal the children's preference for purposes of creating a record for appeal, *Molloy v Molloy*, 466 Mich 852; 643 NW2d 574 (2002), and we must defer to the trial court's determination with respect to this factor.

The trial court found that neither party prevailed with respect to factor (j). Plaintiff contends she should have prevailed on this factor because defendant did not encourage her relationship with the children. However, the trial court found that the parties were "equally bad" in this respect.[1] Despite plaintiff's assurance that she would willingly work to facilitate defendant's relationship with the children, her conduct belied this assertion. The trial court's finding that neither party prevailed on this factor is not against the great weight of the evidence.

The trial court did not weigh factor (k) in favor of either party because it was not convinced that the case involved domestic violence and allegations of abuse were not proven. In arguing against this finding, plaintiff focuses on defendant's alleged conduct during the marriage rather than on any circumstances since the previous custody determination. While plaintiff asserts that defendant continued to be verbally abusive in front of the children, the evidence overwhelmingly showed that it was plaintiff who primarily displayed inappropriate behavior toward defendant and his wife in the presence of the children. However, the trial court did not opine that the parties' conduct amounted to domestic violence. The trial court's findings with respect to this factor are not against the great weight of the evidence.

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[1] Although plaintiff asserts that defendant and his wife fabricated evidence about the incident at the Jewish Community Center when security intervened to remove plaintiff, no testimony was offered showing that the report was falsified.

With respect to factor (l), any other factor relevant to the particular custody dispute, plaintiff essentially repeats her prior arguments. Plaintiff also asserts that defendant forced their nine-year-old daughter to write a letter to the court supporting defendant's initial allegations. However, the evidence showed that the child authored the letter of her own accord. Plaintiff has not demonstrated that the trial court erred in finding that factor (l) did not favor either party.

A trial court's exercise of discretion in changing custody is entitled to the utmost deference, *Shulick*, *supra* at 323-325, but the court's ultimate decision must still comport with the great weight of the evidence, *Foskett, supra* at 13. The trial court found that the parties were equal with respect to most of the best interest factors, but that certain factors favored defendant. We have found no clear error in the trial court's determination of the best interest factors. In light of those factors, the trial court did not abuse its discretion in changing custody to award defendant primary physical custody of the children.

C. Timeliness of Custody Hearing

Plaintiff also argues that the trial court failed to adhere to the time constraints in MCR 3.210(C)(1) and (3), which require the court to conduct a custody hearing within 56 days after a court order for a hearing or after the filing of notice that a custody hearing is requested, and to issue a decision within 28 days after the hearing. MCR 3.210 applies to both hearings and trials in domestic relations matters. However, MCR 3.213 also provides that "[p]ostjudgment motions in domestic relations actions are governed by MCR 2.119." Even if MCR 3.210(C)(1) and (3) apply to postjudgment motions, MCR 3.210(C)(7) provides that the court "may extend for good cause the time within which a hearing must be held and a decision rendered under this subrule." Although these proceedings were prolonged, defendant's initial petition was followed by a Friend of the Court investigation. The children were then temporarily removed from plaintiff's custody and that decision was supported by the referee's investigation. Given the allegations, the court referred the parties for psychological evaluations. Discovery was also necessary, and a Friend of the Court referee initially heard the matter. Both parties objected to the referee's findings and requested a de novo hearing by the court. Under the circumstances, plaintiff has not established that there was not good cause for the delay. Once the hearing was conducted, the trial court timely issued its decision in accordance with MCR 3.210(C)(3).

III. Child Support

Finally, plaintiff argues that the trial court should not have addressed the issue of child support because defendant's original petition to change custody did not request support. Plaintiff also argues that a deviation from the child support guidelines was warranted.

Initially, the record discloses that plaintiff conceded that the issue of child support was formally raised in February 2008. While properly raised in the trial court, the issue of child support is not properly before this Court in this appeal. The trial court did not decide the issue of child support as part of its custody determination. Instead, the court referred that matter back to the Friend of the Court and the issue of child support was not decided until after this appeal was

filed. Therefore, this Court does not have jurisdiction to consider that issue in this appeal.[2] *Surman v Surman*, 277 Mich App 287, 293-294; 745 NW2d 802 (2007); *McDonald v Stroh Brewery Co*, 191 Mich App 601, 609; 478 NW2d 669 (1991).

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

[2] We note that plaintiff filed a claim of appeal from the February 11, 2009, order modifying child support, but this Court dismissed the appeal for lack of jurisdiction. *Littman v Cohen*, unpublished order of the Court of Appeals, entered March 24, 2009 (Docket No. 290699). As this Court noted in that order, plaintiff's remedy is to file a delayed application for leave to appeal from the order modifying child support. *Id.*